Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1997

JLM AVIATION INTERNATIONAL, INC.
AND JOSE L. MENDIOLA,

*Petitioners,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a "deliberate ignorance" or "conscious avoidance" instruction may properly be given in a case in which the government must prove that a defendant violated a known legal duty imposed by regulation?

## PARTIES TO THE PROCEEDING

1. JLM AVIATION INTERNATIONAL, INC. and JOSE L. MENDIOLA are the Petitioners;

2. THE UNITED STATES OF AMERICA is the Respondent;

3. Petitioners were represented in the trial court by Mr. Michael D. Bernard and Ms. Julie Pollock;

4. Respondent was represented in the trial court by Christopher L. Varner and James A. Baker, attorneys with the United States Department of Justice;

5. Petitioners were represented on appeal by Mr. Michael D. Bernard;

6. Respondent was represented on appeal by Ms. Florence Pan, Mr. Christopher L. Varner, and Mr. James A. Baker;

7. Petitioners are represented in this Honorable Court by Mr. Michael D. Bernard and Ms. Nancy B. Barohn.

TABLE OF CONTENTS

Page

Opinion Below ..... 1

Jurisdiction Of The Supreme Court Of The United States ..... 1

Constitutional Provisions Involved ..... 1

Statement ..... 2

A. The Regulatory Background Of The Case .... 3

B. The Trial Evidence..... 5

C. The Issue Of Mens Rea..... 12

D. What The Fifth Circuit Found ..... 13

Reasons For Granting The Writ ..... 14

I. WHETHER A "DELIBERATE INDIFFERENCE" OR "CONSCIOUS AVOIDANCE" INSTRUCTION MAY PROPERLY BE GIVEN IN A CASE IN WHICH THE GOVERNMENT MUST PROVE THAT A DEFENDANT VIOLATED A KNOWN LEGAL DUTY IMPOSED BY REGULATION? ... 15

Conclusion ..... 21

## TABLE OF AUTHORITIES

Page

CASES

Cheek v. United States, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991)..... 14, 17, 18

In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970).... 20

Liparota v. United States, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985)..... 14, 17, 18, 19

Ratzlaf v. United States, 114 S.Ct. 655 (1994).... 14, 16, 17

United States v. de Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991)..... 20

United States v. Feroz, 848 F.2d 359 (2d Cir. 1988).. 15, 19

United States v. Gaudin, 115 S.Ct. 2310 (1995)..... 20

United States v. Hilliard, 31 F.3d 1509 (10th Cir. 1994).....19, 21

United States of America v. JLM Aviation International, Inc., Jose L. Mendiola, Arthur Stewart, slip op. No. 96-50356..... 1

United States v. Lara-Velasquez, 919 F.2d 946 (5th Cir. 1990) .....15, 19

STATUTES

18 U.S.C. § 371..... 2

18 U.S.C. § 1001..... 3

18 U.S.C. § 1341..... 2

18 U.S.C. § 1343..... 2

18 U.S.C. § 3231..... 2

28 U.S.C. § 1254(1) ..... 1

TABLE OF AUTHORITIES – Continued

Page

31 U.S.C. § 5313 ..... 17

31 U.S.C. § 5324 ..... 17

RULES

SUP.CT.R. 10(a) ..... 15

SUP.CT.R. 10(c) ..... 15

SUP.CT.R. 13.3 ..... 1

OTHER AUTHORITY

U.S. Const., Amend. V ..... 1

U.S. Const., Amend. VI ..... 1

21 C.F.R. Part 21, § 303(a) and (b) ..... 6

## OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States of America v. JLM Aviation International, Inc., Jose L. Mendiola, Arthur Stewart*, No. 96-50356, was entered on July 25, 1997, and is reproduced in the Appendix at 1-18.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered on July 25, 1997. A petition for panel rehearing was denied by the Fifth Circuit on August 29, 1997. Appendix at 19. This petition is filed within ninety days after the denial of the petition for panel rehearing. SUP.CT.R. 13.3. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that:

> No person . . . held to answer for a capital, or otherwise infamous crime, . . . [shall] be deprived of life, liberty, or property, without due process of law . . .

The Sixth Amendment to the United States Constitution provides in pertinent part that:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

## STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231. Petitioners, JLM Aviation International, Incorporated (hereinafter "JLM") and Jose L. Mendiola, were charged by twelve-count indictment with various offense relating to the manufacture of "counterfeit, defective and fraudulently documented aircraft parts" for resale and installation on civil aircraft. Charged with Petitioners were Mr. Arthur Stewart, and Gary Aerospace Corporation, of which Mr. Stewart served as vice president. All defendants were charged in Count One with conspiracy to defraud the United States and its agencies, viz., the United States Department of Transportation, and the FAA, of its right to honest government services, and to obtain money by false and fraudulent pretenses through the mails, and over the interstate wire, in violation of 18 U.S.C. § 371. In Counts Two through Six, all defendants were charged with mail fraud, contrary to 18 U.S.C. § 1341; and, in Counts Seven through Eleven, all defendants were charged with wire fraud, contrary to 18 U.S.C. § 1343. In Count Twelve,

Petitioners JLM and Mr. Mendiola were charged with making false statements in violation of 18 U.S.C. § 1001.

Following a trial by jury in the United States District Court for the Western District of Texas, Petitioner JLM was found guilty of all counts; Petitioner Jose L. Mendiola was found guilty of all counts save Count Eleven, of which he was acquitted.[1] Thereafter, Mr. Mendiola was sentenced to a term of 48 months' confinement in the custody of the Bureau of Prisons; JLM was sentenced to five years' probation, and was fined $120,000.

### A. The Regulatory Background Of The Case.

The conduct alleged as criminal in the indictment occurred against the backdrop of the FAA's regulatory scheme for the manufacture of replacement aircraft parts. Appendix at 24-26. In the "Background" to the conspiracy alleged, the indictment detailed the regulatory nature of the offenses, and the particular FAA regulations applicable in this discrete area. *Id.* As described in the indictment:

> 10. Replacement parts installed on aircraft with Type Certificates were required to comply with provisions of federal aviation regulations. Replacement parts had to be certified as having been manufactured and tested in accordance

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[1] Defendants Arthur Stewart and Gary Aerospace Corporation were found guilty of all counts. On appeal, Arthur Stewart was acquitted when a panel of the Fifth Circuit Court of Appeals found the evidence insufficient to support his conviction as a matter of law. Gary Aerospace did not appeal. Appendix at 10, 17.

> with FAA-approved assurance standards. Use of a non-approved replacement part on an aircraft rendered its Type Certificate and Airworthiness Certificate Invalid.

Appendix at 25. According to the indictment, the FAA, through its regulations, recognized two primary authorized classes of aircraft parts producers: an Original Equipment Manufacturer, or its licensee (OEM); and those companies which had obtained Parts Manufacture Approval (or PMA) from the FAA. *Id.* As set forth in the indictment, PMA holders were required to manufacture parts "based on approved design data, including drawings and specifications for a particular part." Appendix at 25-6. A manufacturer, it was alleged, incurred significant costs in obtaining PMA from the FAA. Appendix at 26. Under the regulatory scheme, manufacturers, when selling aircraft parts, were required to certify to customers that the replacement parts had been produced in accordance with federal aviation regulations as a means of assuring the customer that the parts had been manufactured in accordance with FAA regulations, and could be traced to either an OEM or PMA holder. Appendix at 25.

The government alleged that Defendants Arthur Stewart and Gary Aerospace Corporation manufactured a "counterfeit and defective" aircraft part for Petitioners, JLM and Jose L. Mendiola – specifically, a slat track roller bolt assembly, Boeing part No. 69-13995-4; and that, thereafter, Petitioners falsely represented to their own customers that the parts were genuine and airworthy Boeing parts. Appendix at 29. It was the government's contention that the Defendants Arthur Stewart and Gary Aerospace Corporation manufactured approximately

1,350 of these slat track roller bolt assemblies for sale to Petitioners, and represented to Petitioners that the bolt assemblies "were in fact genuine Boeing parts in an airworthy condition." Appendix at 28-9.

The mail fraud counts of the indictment, Counts Two through Six, were based upon the mailing of checks by JLM and Jose Mendiola to Defendants Arthur Stewart and Gary Aerospace, in payment for the bolts manufactured and received. Appendix at 35-43. The wire fraud counts, in Counts Seven through Twelve, were based upon facsimile and inventory locator service (ILS) transmissions regarding the sale and purchase of the same bolt assemblies. Appendix at 43-4. Count Twelve alleged that Petitioners falsely represented to a customer, Dee Howard, that the bolt assemblies manufactured by Gary Aerospace were manufactured by Boeing or one of its authorized licensees, and came from an FAA-authorized source. Appendix at 45-6.

**B. The Trial Evidence.**

Jose Mendiola owns and operates JLM Aviation International, Inc., an aircraft parts brokerage company based in Naperville, Illinois. Companies seeking price quotes on specific aircraft parts would contact JLM by telephone, fax, or through a computerized system called SITA. In response, Mr. Mendiola, or one of his employees, would solicit price quotes from potential suppliers. Often varying widely, suppliers' price quotes were then used by Mr. Mendiola to set his own prices to a company seeking parts from his brokerage firm. When an order was placed with JLM, JLM would order parts from its supplier. When

the parts were received, a JLM employee would conduct a visual inspection of the parts for obvious damage, would count the parts, and would verify the parts against the shipping order and invoice. JLM would then repackage the order, fill out any necessary certification forms, then ship the order to its customer.

The trial evidence showed that FAA regulations require that parts placed on civil aircraft "conform" to FAA standards and be "traceable" to the original manufacturer.[2] Mr. Mendiola had established a certification procedure at JLM that he asked his employees to follow. Where a JLM customer requested certification of parts

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[2] Title 14, Code of Federal Regulations, Part 21, Section 303(a), states that:

> Except as provided in paragraph (b) of this section, no person may produce a modification or replacement part for sale for installation on a type certificated product unless it is produced pursuant to a Parts Manufacturer Approval issued under this subpart.

Paragraph (b) exception includes the following alternate means for manufacturing aircraft parts:

(1) Parts produced under a type of production certificate;

(2) Parts produced by an owner or operator for maintaining or altering his own product;

(3) Parts produced under an FAA Technical Standard Order;

(4) Standard parts (such as bolts and nuts) conforming to established industry or U.S. specifications.

ordered, a JLM employee filled out a form that Mr. Mendiola had devised.[3] Mr. Mendiola directed his employees to complete the certification forms according to the certification and shipment orders received by JLM from parts suppliers.

In May of 1992, at an industry conference in the Dominican Republic, Mr. Mendiola and his wife met Manuel Nieves, who was part owner of Total Nacelle Systems, a business in Hondo, Texas. Sometime after the conference, Mr. Mendiola received an inquiry from Mexicana Airlines for a price quote on a large number of Boeing bolts, part number 69-13995-4 for use on its 727-200 planes. Mr. Mendiola called Mr. Nieves to see if his company could provide the bolts Mexicana requested. Mr. Mendiola advised Mr. Nieves that he was looking for Boeing bolts, or for bolts manufactured by someone with authority to do so, because Mexicana required certification of the parts. At Nieves' request, Mr. Mendiola sent him a sample bolt from his inventory.[4]

Mr. Nieves contacted Gary Aerospace about Mr. Mendiola's request, and provided the sample part. Mr. Nieves made it clear to Gary that the bolts had to be

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[3] Parts brokers are not regulated by the FAA. The FAA does not provide any standard form to be used by brokers in certifying aircraft parts. Nor does the FAA provide brokers with any instructions on what the forms are to say, or how they are to be filled out. Samples are not provided. Accordingly, brokers such as Mr. Mendiola and JLM devise their own forms to send to customers.

[4] Mr. Mendiola had received the sample bolt from Distinctive Aviation.

properly certified, and that JLM was looking for authorized bolts, or bolts with proper certification. Nieves advised Defendant Arthur Stewart to contact Boeing to get permission to make the bolt, and to obtain the necessary drawings. For whatever reason, Gary did not seek authority from Boeing to make the bolt. Instead, Gary manufactured the bolt through a process of reverse engineering. Some of Gary's employees expressed concern to Defendant Arthur Stewart that the project was beyond the scope of Gary's FAA-authorized work. Though employee concerns about the propriety of reverse engineering the Boeing bolts were brought to the attention of Mr. Stewart, they were never conveyed to anyone at JLM, or to Mr. Mendiola personally.

Instead, after examining the sample bolt, Gary determined that the sample was a standard bolt, bearing NAS No. 6708-52, which had been modified.[5] Gary solicited bids from several companies which sold the NAS bolt, and ultimately purchased the standard bolts from a firm called Ameritech Fastener Manufacturing. Gary calculated its cost to modify the bolts, added in a profit margin, then quoted a price to Mendiola. In a written price quote transmitted to JLM and Mr. Mendiola, Gary Aerospace stated that:

> Certification will be provided from the manufacture[r] of the NAS6708-52 bolt. Also, **Gary Aerospace will certify "manufactured" as per sample provided**. (Emphasis added.)

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[5] NAS parts are "standard" parts which require no special certification by the FAA for use in aircraft in unmodified form. Many Boeing parts have NAS alternate part numbers.

JLM sent Gary a purchase order for 500 bolts, followed by a purchase order for 850 bolts. In order to fill JLM's order, Gary ordered 1,350 NAS bolts from Ameritech.

The first shipment of bolts from Gary to JLM included a shipping order, which described the contents as "**Bolts, 69-13995-4**", and included a copy of the NAS certification from Ameritech, the manufacturer of the NAS bolt, though Ameritech's name had been blacked out, and replaced with Gary's name.[6] Mr. Mendiola was never informed that the certifications were done for the NAS bolt only, rather than the bolt as modified, or that the modifications were made to the NAS bolt in the absence of proper drawings and authorization. The shipping orders accompanying the balance of the shipments described the contents as, "Bolts, NAS6708-52 modified to 69-13995-4 as per sample."

In due course, JLM shipped the bolts manufactured by Gary to Mexicana Airlines. Included with the bolts was a certification from JLM which stated that the bolts were new, and had been manufactured by Boeing **or one of its licensees**. The JLM certification form indicated that the source of the bolts was the "Original Equipment Manufacturer, Authorized Distributor, (F.A.A./P.M.A.)." JLM's certification stated that, "This certification is based

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[6] This practice, apparently, was common as vendors did not wish to be circumvented on the customer's next purchase.

on documentation supplied by our vendor and is on file."[7]

In the fall of 1992, Mr. Nieves became concerned that the bolts produced by Gary had not been done in conformity with FAA certification regulations. Nieves contacted the FAA, which asked him to obtain a sample of the bolts produced by Gary, along with the certification sent with

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[7] Though Boeing is an Original Equipment Manufacturer, OEM's can manufacture parts for use on aircraft in some, but not all, situations. As stated in a Department of Transportation Report admitted in evidence at trial:

> OIG and FAA reviews identified a systemic problem of manufacturers producing and selling replacement aircraft parts without PMA authority. Many manufacturers are original equipment manufacturers (OEMs) who supply parts and materials to other certificate holds. Being an OEM does not satisfy FAA parts approval requirements.

Indeed, the Department of Transportation found widespread confusion over whether, and in what circumstances, OEM parts have FAA approval. In the DOT's report, admitted in evidence at trial, it was observed that:

> The existence of OEM unapproved parts is primarily attributed to lack of knowledge of the PMA requirements. The sale and use of OEM parts without PMA also have been sanctioned by an industry-wide attitude, including Production Certificate holders and users, that these parts were acceptable without PMA. FAA began educating the industry on approved parts through seminars in October 1992. The seminars were briefly stopped in early 1993 when industry representatives expressed concern that seminars were causing unnecessary confusion and panic. FAA presented 61 seminars at 23 locations during FY 1993 and scheduled 51 seminars at 26 locations for FY 1994.

the bolts. Mr. Nieves contacted Mr. Mendiola and asked him to provide one of the Gary bolts, along with the certifications he had received. When Mr. Mendiola asked Nieves if there was a problem with the bolt, Nieves informed him that he did not know. At trial, Nieves testified that it was his opinion that Mr. Mendiola wanted a properly produced and certified part when he had made his initial request to Total Nacelle, and, further, that Mr. Mendiola believed that this is what he had received.

With the assistance of a San Antonio based aviation repair shop, the Dee Howard company, the FAA began an investigation of JLM. First, a federal agent and a Dee Howard buyer looked in the computerized Inventory Locator Service (ILS) and found JLM offering Boeing 69-13995-4 bolts for sale. Dee Howard ordered four bolts, stating on the purchase order that Dee Howard "require[d] certificate of compliance for above Boeing item." A package of four bolts was sent by JLM to Dee Howard, along with a certification that the parts were new Boeing parts from the original equipment manufacturer **or one of its licensees**. JLM's certification also stated that "this certification is based on documentation supplied by our vendor, and is on file." The agent checked with Boeing, which informed him that it had not manufactured the bolts sent by JLM.

A second undercover purchase of JLM's Boeing 69-13995-4 bolts was initiated by a different federal agent several months later, under the name of JIMCO, a corporation formed by federal agents for use in undercover operations. JIMCO ordered eight bolts from JLM. One of JLM's employees processed JIMCO's order for shipping. Another employee testified that she asked Mr. Mendiola

who she should list as the FAA-authorized source of the bolts, and Mr. Mendiola told her to list Eastern Airlines.[8]

In aid of its case, over the repeated objections of the defense, the government adduced evidence of a similar transaction engaged in by JLM and Mr. Mendiola, described as the Paul Carlson transactions. Carlson testified that he had illegally manufactured aircraft parts from samples which had been sent to him by a Mr. Joe Spaulding of Pride Maintenance, who had received the parts for manufacture from JLM. Carlson never told Mr. Mendiola or anyone at JLM that he was not authorized to manufacture Boeing parts[9].

### C. The Issue Of Mens Rea.

In order to prove Petitioners' guilt of each count, as the court below recognized, the government was obligated to prove that Petitioners had the specific intent to defraud. Appendix at 6. Under the jury charge, the government was also required to prove that Petitioners violated a known legal duty. Appendix at 49. The trial court

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[8] JLM had recently done substantial business with Eastern Airlines. Nonetheless, in his testimony, Mr. Mendiola denied telling his employee to specify Eastern as the source and believed his employee was mistaken. This transaction constituted the count in the indictment of which Mr. Mendiola was acquitted.

[9] Though highly prejudicial, the Carlson transactions did little to advance the government's proof because, as with Gary Aerospace, there was no evidence that Mr. Mendiola or JLM had ever been informed that Carlson lacked manufacturing authority.

instructed the jury that, though a violation of FAA rules or regulations was not a crime, the jury could

> . . . consider any evidence of violations of such rules and regulations as you would any other evidence in determining whether or not the defendants had the required intent to violate the criminal laws charged in this indictment.

Appendix at 48.

Over defense counsel's objections, the court instructed the jury that it could find that a defendant acted "knowingly" or "had knowledge of a fact" if it found that the defendant was deliberately ignorant or willfully blind "to what would otherwise have been obvious to him." Appendix at 50. The court also instructed the jury on the defense of good faith.[10] Appendix at 49.

### D. What The Fifth Circuit Found.

In rejecting Petitioners' challenge to the giving of the "deliberate ignorance" instruction, the panel had this to say:

> The purpose of the deliberate ignorance instruction is to inform the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge. *United States v. McKinney*, 53 F.3d

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[10] As set out in the opinion, the trial court refused the defense's request to instruct the jury that a defendant's ignorance must be determined based on what the defendant subjectively knew, as opposed to what might be considered objectively reasonable. Appendix at 16, n.12.

> 664, 676 (5th Cir.), cert. denied, 116 S.Ct. 261 (1995). "It should only be given when a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate ignorance." *Id.*
>
> JLM and Mendiola based their defense upon, inter alia, lack of guilty knowledge or intent to deceive. Furthermore, we have approved this instruction as being a correct statement of the law. *See United States v. Investment Enterprises,* 10 F.3d 263 (5th Cir. 1993). After reviewing the record, we hold that there is enough evidence to support the deliberate indifference instruction, and the instruction, as given, was a correct statement of the law.

Appendix at 17.

## REASONS FOR GRANTING THE WRIT

In upholding the trial court's decision to instruct the jury on "deliberate indifference" or "conscious avoidance" in a case which required the jury to find that Petitioners violated a known legal duty imposed by FAA regulations governing the manufacture and use of aircraft replacement parts, the Fifth Circuit Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court; and has decided an important question in a way that conflicts with this Court's decisions in *Ratzlaf v. United States,* 114 S.Ct. 655 (1994); *Cheek v. United States,* 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991); and *Liparota v. United States,* 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985).

SUP.CT.R. 10(c). In addition, there appear to be differences between at least the Second and Fifth Circuits in the substance of the deliberate ignorance charge. *United States v. Feroz*, 848 F.2d 359 (2d Cir. 1988); *United States v. Lara-Velasquez*, 919 F.2d 946 (5th Cir. 1990). SUP.CT.R. 10(a).

## I. WHETHER A "DELIBERATE INDIFFERENCE" OR "CONSCIOUS AVOIDANCE" INSTRUCTION MAY PROPERLY BE GIVEN IN A CASE IN WHICH THE GOVERNMENT MUST PROVE THAT A DEFENDANT VIOLATED A KNOWN LEGAL DUTY IMPOSED BY REGULATION?

In instructing the jury on the defense of good faith, the trial court informed the jury that:

> . . . the government must prove beyond reasonable doubt that the individual violated a known legal duty.

Appendix at 49. Application of the instruction to the facts of the case suggest that the government was obligated to prove that Mr. Mendiola and JLM had a high level of knowledge, viz., 1) that Petitioners JLM and Mr. Mendiola knew, except in several enumerated circumstances, that the FAA authorized only OEM's, their licensees, and companies with PMA to manufacture aircraft parts for use in commercial aircraft; and, 2) that Petitioners knew that Gary Aerospace was neither an OEM, a licensee of Boeing, nor had PMA, and that production was not within the enumerated exceptions.[11] The government should have been obligated to prove this

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[11] *See* Title 14, C.F.R. Part 21, § 303(b), quoted at fn. 2 above.

level of knowledge on the part of Petitioners in addition to its obligation to prove the specific intent to defraud.

The government, in its brief in the court below, conceded that it had no direct proof of Petitioners' mens rea, but only circumstantial evidence from which the jury could infer "conscious knowledge". The circumstances identified by the government were: 1) that "experienced buyers" of aircraft parts "***would know***" that legitimate "Boeing bolts" are manufactured by Boeing only; 2) that Mr. Mendiola was "an experienced and knowledgeable ***broker*** of aircraft parts; 3) that JLM and Mr. Mendiola had to know that Gary Aerospace had no authority to manufacture a genuine Boeing bolt because Mr. Mendiola had been asked to forward a sample part;[12] 5) that Mr. Mendiola knew how to buy legitimate parts from Boeing; 6) that the "Boeing" bolts sold to JLM by Gary Aerospace were sold at rock-bottom prices; 7) that Mr. Mendiola made inconsistent statements to investigators; and, 8) that Mr. Mendiola had yelled at one of his employees for cooperating with federal investigators, and had instructed her to list "Eastern Airlines" as the source of the Boeing bolt sold to JIMCO.[13] This was the entirety of the government's articulation of its own case on the level of Petitioners' knowledge of legal duties imposed by the FAA,

Though Petitioners have found no decision of this Court directly in point, decisions in *Ratzlaf v. United*

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[12] This practice, apparently, was not uncommon in the industry.

[13] As to this last contention, Mr. Mendiola was specifically found not guilty by the jury.

*States*, 114 S.Ct. 655 (1994); *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed.2d 617 (1991); and *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), are instructive. All require a higher level of proof on the question of a defendant's knowledge where criminal liability may be imposed under laws which are difficult and complex, or which directly or indirectly involve regulatory provisions.

In *Ratzlaf*, petitioner contended that he could not be convicted of willfully violating the federal anti-structuring law, 31 U.S.C. §§ 5313, 5324, solely on the basis of his knowledge that a financial institution must report currency transactions in excess of $10,000, and his intention to avoid such reporting. 114 S.Ct. at 657. Rather, the petitioner contended, the government was obligated to prove that he was aware, as well, of the illegality of the "structuring" in which he engaged. *Id.* Against Ratzlaf's contention, the government argued that a structurer should be held responsible for evading the reporting requirements without the need to prove specific knowledge that the evasion is unlawful. 114 S.Ct. at 660.

This Court pointed out that currency structuring "is not inevitably nefarious", giving numerous examples of structured transactions with wholly innocent purposes. 114 S.Ct. at 660-61. This Court rejected the government's argument that a defendant's guilt could be proved irrespective of his knowledge of the illegality of structuring. 114 S.Ct. at 662.

Similarly, in *Cheek v. United States*, 111 S.Ct. 604 (1991), the defendant was charged with willfully failing to file a federal income tax return for six consecutive

years, and with willfully evading his income taxes for three tax years. 111 S.Ct. at 606-07. There, as here, the trial court instructed the jury that the government was obligated to prove that the defendant voluntarily and intentionally violated a known legal duty. 111 S.Ct. at 607. Though acknowledging the general rule that ignorance of the law, or mistake of law, is no defense to a criminal prosecution, this Court recognized that:

> The proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws. Congress has accordingly softened the impact of the common-law presumption by making specific intent to violate the law an element of certain tax offenses.

111 S.Ct. at 609. This Court concluded that, in a tax case such as Cheek's, the government was obligated to prove that the law imposed a duty on the defendant, that the defendant knew of his duty, and that he voluntarily and intentionally violated that duty. 111 S.Ct. at 610. In carrying its burden of proof, the government is required to negate a defendant's claim of ignorance of the law or a claim that, because of a misunderstanding of the law, he had a good faith belief that he was not violating any provisions of the tax laws. *Id.* The government does not carry its burden on the issue of willfulness if a jury credits the defendant's actual, though unreasonable, belief. 111 S.Ct. at 611.

Finally, in *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), this Court was asked to construe the reach of a statute criminalizing possession of

food stamps "in any manner not authorized by [the statute] or the regulations." 105 S.Ct. at 2085. Petitioner contended that the prosecution was required to prove that he knew he was acting in a manner not authorized by the statute or regulations. 105 S.Ct. at 2086. This Court agreed, and found that, absent an indication of contrary purpose in the statutory language or legislative history, the statute requires a showing that the defendant knew his conduct was unauthorized by statute or regulation. 105 S.Ct. at 2088. As this Court explained:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of human will and a consequent ability and duty of the normal individual to choose between good and evil.

105 S.Ct. at 2088 (other citations omitted).

In the courts of appeals, a deliberate ignorance instruction is frequently approved in controlled substances cases, *see, e.g., United States v. Lara-Velasquez*, 919 F.2d 946, 951 (5th Cir. 1990); *United States v. Feroz*, 848 F.2d 359, 360-61 (2d Cir. 1988). By contrast, the Tenth Circuit found the giving of the instruction to be reversible error in a case in which the defendant was alleged to have consciously avoided knowledge of his obligations under Federal Home Loan Bank Board regulations. *United States v. Hilliard*, 31 F.3d 1509, 1515 (10th Cir. 1994). As stated there:

> In deciding whether a deliberate ignorance instruction is appropriate, we have stressed that evidence is required showing that the defendant

> denies knowledge of an operative fact and defendant's actions include deliberate acts aimed at avoidance of actual knowledge. *de Francisco-Lopez*, 939 F.2d at 1411.[14] This case involves somewhat complicated financial transactions combined with professional legal and accounting advice of varying quality, some of which was heeded, and some of which was not. It "is far removed from those in which the clues of association with the crime charged were so obvious that the clues, combined with suspicion, necessarily implicated the defendant." *Id.* at 1412.

*Id.*

In our case, under the court's instructions to the jury, the government was obligated to prove that Petitioners violated a known legal duty. Not only did the government fail to adduce any evidence on this particular aspect of mens rea, the trial court effectively relieved it of its burden of proof by instructing the jury that it could find that Petitioners had the requisite knowledge for conviction if they were "deliberately ignorant" or "willfully blind" to a fact.

We suggest that where, as here, criminal liability is premised upon a knowledge of legal duties imposed by regulation, a deliberate ignorance instructions is inappropriate because it relieves the government of its burden of proof, *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970); *United States v. Gaudin*, 115 S.Ct. 2310 (1995), and creates the very real danger that a jury will convict a defendant

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[14] *United States v. de Francisco-Lopez*, 939 F.2d 1405 (10th Cir. 1991).

for mere negligence, for what the defendant "should have known". *United States v. Hilliard*, 31 F.3d at 1516.

## CONCLUSION

FOR THESE REASONS, Petitioners respectfully pray that this Honorable Court will grant certiorari to review the decision of the court of appeals in this case.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

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No. 96-50356

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JLM AVIATION INTERNATIONAL, INCORPORATED; JOSE L. MENDIOLA; ARTHUR STEWART,

Defendants-Appellants.

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Appeal from the United States District Court
for the Western District of Texas

(SA-95-CR-78)

(Filed Jul. 25, 1997)

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Before POLITZ, Chief Judge, DeMOSS, Circuit Judge, and DOHERTY,[1] District Judge.

PER CURIAM:[2]

Defendants were each involved in different aspects of the aircraft part manufacturing business. As a result of a

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[1] District Judge of the Western District of Louisiana, sitting by designation.

[2] Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

federal investigation, they were each tried for charges relating to the manufacturing of counterfeit, defective, and fraudulently documented aircraft parts for resale and installation in civil aircraft. Following a jury trial, Appellants JLM Aviation International, Inc., Jose Mendiola, and Arthur Stewart were convicted of conspiracy to defraud the United States, 18 U.S.C. § 371, to commit mail fraud, 18 U.S.C. § 1341, and to commit wire fraud, 18 U.S.C. § 1343. JLM and Mendiola were additionally convicted of making false statements in a matter within the jurisdiction of the United States, 18 U.S.C. § 1001. Defendants appeal their respective convictions. For the following reasons, we AFFIRM the convictions and sentence as to JLM Aviation International, Inc.. and Jose Mendiola, and we VACATE the convictions and sentence as to Arthur Stewart.

## INTRODUCTION

In 1992, Jose Mendiola ("Mendiola") was the owner, operator, and president of JLM Aviation International, Inc. ("JLM"), in Naperville, Illinois. JLM is a broker of aircraft parts. Customers contact JLM for certain parts, which JLM attempts to secure through third-party suppliers. Once the parts are obtained from the supplier, JLM resells them to its customer for a profit. Generally, the customer has no contact with, and does not know the identity of, the third-party supplier. The supplier simply provides the parts to JLM which repackages them, provides any necessary certification forms, and ships the order to the customer.

In the spring of 1992, Mendiola attended an industry conference in the Dominican Republic where he met Manuel Nieves ("Nieves") of Total Nacelle Systems, Inc. ("Total Nacelle") of Hondo, Texas. Shortly after the conference, Mendiola asked Nieves if Total Nacelle could machine some Boeing bolt assemblies identified by part number 69-13995-4.[3] Mendiola sent Nieves a purported sample of the Boeing bolt assembly ("sample bolt").

Because Total Nacelle did not have the capability to make such a bolt, Nieves referred Mendiola to his business partner, Arthur Stewart ("Stewart"), who was General Manager of another aviation repair and machine shop, Gary Aerospace, Inc. ("Gary Aerospace"), also in Hondo, Texas. Nieves gave the sample bolt to Stewart at Gary Aerospace.

Employees at Gary Aerospace determined that the sample bolt was a modified National Aerospace Standard bolt, part number 670852 ("NAS 6708-52").[4] It is

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[3] Boeing Aircraft Company manufactured Boeing 727 aircraft from 1963-1984. Boeing is the original equipment manufacturer ("OEM") for airplanes that are still in service. Many of the aircraft parts manufactured by Boeing are "proprietary design parts." These Boeing proprietary design parts have part numbers with distinctive prefixes that are recognized throughout the industry. For example, any part number beginning with "69" is a Boeing proprietary part. The bolt at issue in this case, No. 69-13995-4, holds the roller bearings of the tracks upon which the wing slats of a Boeing 727 aircraft extend and retract. Although Boeing proprietary parts may be obtained at discounted prices in the surplus market, these surplus parts were originally manufactured by Boeing.

[4] NAS parts are "standard" parts, which require no special certification by the FAA for use in aircraft. Boeing proprietary

undisputed that the Boeing proprietary bolt was manufactured by making certain modifications to the NAS 6708-52 bolt. Stewart's employees told him that they could replicate the Boeing proprietary bolt by copying or "reverse engineering" the sample. Gary Aerospace notified JLM that it could provide the modified bolts and that "[c]ertification will be provided from the manufacture [sic] of the NAS6708-52 bolt. Also, Gary Aerospace will certify 'manufactured' as per sample provided." Gary Aerospace did not state that it could offer bolts which would certify to the Boeing proprietary number; Gary Aerospace promised only JLM that it could offer bolts which would certify to the NAS number.

In the summer of 1992, JLM sent Gary Aerospace purchase orders for over 1,200 bolts. After soliciting bids from several companies, Gary Aerospace ordered and received approximately 1,200 unmodified NAS bolts from Ameritech Fastener Manufacturing, Inc. ("Ameritech"). Ameritech provided documentation showing that these bolts were certified to NAS standards.

Upon receiving the NAS bolts from Ameritech, Gary Aerospace modified them to meet the specifications of JLM's sample bolt. In the fall of 1992, Gary Aerospace made five shipments of bolts to JLM. The first shipment contained a copy of the NAS certification from Ameritech, with Ameritech's name blacked-out.[5] The following

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bolt 69-13995-4 was manufactured by making certified modifications to the NAS 6708-52 bolt.

[5] Gary Aerospace's purchasing agent testified that this practice was not uncommon in the industry, because it prevented suppliers like Gary Aerospace from being circumvented in subsequent orders.

four shipments contained shipping orders which read, "Bolts, NAS6708-52 modified to 69-13994-4 per sample." All of the shipping orders displayed the Gary Aerospace corporate logo.

After JLM and Mendiola received the bolts from Gary Aerospace, Mendiola sold 1,301 of them to Mexicana Airlines. The certification which accompanied these bolts described them as "new" and "originally manufactured by Boeing or one of their authorized licensees." JLM's certification further provided that "[t]his certification is based on documentation supplied by our vendor and is on file." Mexicana Airlines purchasing agent Roberto Garcia believed that he was buying genuine Boeing parts from JLM.

In September 1992, Nieves and Stewart had a financial dispute and ended their business relationship. In November 1992, Nieves reported Gary Aerospace's activities to the FAA and provided the agency with a sample of the modified NAS bolts which were being sold by Stewart and JLM, along with a copy of the purported certification.

In cooperation with the FBI, the Inspector General's Office of the Department of Transportation ("DOT") opened an investigation. Acting undercover, government agents contacted JLM for price quotes and placed orders for certified Boeing parts. In one instance, the agents received four bolts with a certification stating that the parts were new and manufactured by Boeing or one of its authorized licensees. In another instance, the agents received eight bolts, along with a certification that they had been obtained from "Eastern Airlines." In both

instances, the bolt assemblies were found to be counterfeit.

On September 2, 1993, federal agents executed a search warrant at the offices of JLM. The agents seized counterfeit Boeing parts and assorted paperwork. JLM employee Rita Downey informed the agents that Mendiola had also contracted with a company called Pride Maintenance to have other sample parts copied and mass produced.

## DISCUSSION

To prove conspiracy under 18 U.S.C. § 371, the government must show (1) an agreement between two or more persons, (2) to commit a crime, and (3) an overt act committed by one of the conspirators in furtherance of the agreement. ***United States v. Mackay,*** 33 F.3d 489, 493 (5th Cir. 1994). The government must further prove "that a conspiracy existed, that the defendant knew of the conspiracy and that he knowingly and voluntarily joined it." ***United States v. Gray,*** 96 F.3d 769, 773 (5th Cir. 1996), *cert. denied,* 117 S. Ct. 1275 (1997). When the conspiracy is to commit mail or wire fraud, the. government must show that the conspirators had the requisite intent to defraud. ***United States v. Sneed,*** 63 F.3d 381, 385 (5th Cir. 1995), *cert. denied sub nom. Polley v. United States,* 116 S. Ct. 712 (1996).

To prove mail fraud under 18 U.S.C. § 1341, the government must show (1) a scheme to defraud (2) which involves the use of the mails (3) to execute the scheme. ***United States v. Fox,*** 69 F.3d 15, 17 (5th Cir. 1995). To prove wire fraud under 18 U.S.C. § 1343, the government

must show (1) a scheme to defraud (2) involving the use of, or causing the use of, wire communications in furtherance of the scheme. ***United States v. Loney,*** 959 F.2d 1332, 1337 (5th Cir. 1992); ***United States v. Leahy,*** 82 F.3d 624, 634 (5th Cir. 1996).

In determining whether the government has met its burden, we view the evidence, and all reasonable inferences that may be drawn from it, in the light most favorable to the government, and then decide whether a rational trier of fact could have found each essential element of the offense beyond a reasonable doubt. ***United States v. Prieto-Tejas,*** 779 F.2d 1098, 1101 (5th Cir. 1986); ***United States v. Leal,*** 30 F.3d 577, 582 (5th Cir. 1994), *cert. denied,* 115 S. Ct. 1172 (1995).

*I. Stewart*

Stewart argues that the evidence at trial was insufficient to support his convictions for conspiracy to defraud, and conspiracy to commit mail fraud and wire fraud. To successfully convict Stewart, the government was required to show, beyond a reasonable doubt, that Stewart intentionally participated in a scheme to defraud by fraudulently selling certain bolt assemblies as original Boeing products. We hold that the government did not meet its burden.

In support of its position, the government points to evidence in the record showing that Stewart asked his employees to modify standard NAS bolts into bolts replicating Boeing bolts. The evidence indicates that several of these employees expressed concerns about the legality of making such modifications. The evidence also indicates

that Stewart was aware of their concerns. In the government's words, "Stewart knew that it was illegal for Gary Aerospace to mass produce aircraft parts."

The problem with the government's argument is that it offers no evidence showing that such conduct, even if true, is illegal. Regardless of what his employees may have thought, there is no evidence that Stewart's modification of an NAS bolt to resemble a Boeing bolt is, of itself, a *criminal* act. While replicating a proprietary bolt may violate some civil regulation (an issue about which we offer no opinion), there is no evidence that such conduct violates any criminal statute. In short, construing the evidence in a light most favorable to the government, Stewart's act of modifying NAS bolts was not illegal.

Next, the government argues that "a rational jury could conclude that Stewart knew that JLM and Mendiola intended to sell the bolts as Boeing parts, and thus knowingly participated in Mendiola's scheme." We hold that a rational jury could not reach such a conclusion.

There is absolutely no evidence in the record, circumstantial or otherwise, which would allow a jury to conclude, *beyond a reasonable doubt*, that Stewart intended to defraud JLM, Mendiola, Mexicana Airlines, or any other party. Piling inference upon inference, the government summarily asserts that Stewart must have known that JLM and Mendiola were going to use the bolts to defraud end-users because "there was no legal authorized use for the substandard aircraft parts manufactured by Gary." Again, the government's argument is without merit. The usage of bolts, modified or otherwise, is not governed by criminal law. While some NAS-modified bolts may be

used in aircraft (in which case their usage is governed by civil and regulatory law), other bolts may theoretically be used for different purposes, such as in the building of a particularly sturdy backyard woodshed. Regardless of how the bolts are used, or what proprietary design they bear, mere possession of them is not criminal. It stands to reason, then, that the maker of such bolts cannot be held criminally liable on the premise that their only purpose is illegal. In other words, it cannot be assumed, beyond a reasonable doubt, that Stewart knew, by virtue of his having made the bolts, that they would ultimately be used to commit fraud.

To the extent that there is evidence in the record showing Stewart's intent, Stewart argues that Gary Aerospace's certifications to Mendiola never represented the bolt assemblies as being Boeing products. The invoices state, "CERTIFICATION WILL BE PROVIDED FROM THE MANUFACTURE (sic) OF THE NAS6708-52 BOLT. ALSO, GARY AEROSPACE WILL CERTIFY 'MANUFACTURED' AS PER SAMPLE PROVIDED."[6] Stewart did not make any assertion (oral, written, or otherwise) that the bolts were genuine Boeing bolts. He merely agreed to modify the NAS bolts "as per sample." As discussed earlier, the making of such modifications is not illegal. Construing the evidence in a light most favorable to the government, we hold that a reasonable jury could not find that Stewart intended to defraud.

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[6] The first invoice did not contain this language. All subsequent invoices did contain this language.

Mindful of the great deference that we must pay to the jury's verdict, *Gray*, 96 F.3d at 772, we nevertheless agree with Stewart and hold that, construing the evidence in a light most favorable to the government, a reasonable jury could not find that Stewart had the requisite intent to defraud. For these reasons, the judgment against Stewart is reversed.

### *II. JLM & Mendiola*

JLM and Mendiola raise several issues on appeal. First, they argue that the district court erred by admitting against them evidence of the illegal acts of others. At trial, the government introduced evidence that Mendiola and JLM had purchased other counterfeit Boeing parts from Pride Maintenance and sold them to Mexicana Airlines. This evidence was introduced, over objection, through the testimony of Paul Carlson ("Carlson"), whose company had manufactured the counterfeit parts and sold them to JLM through Pride Maintenance. Carlson testified that Mendiola had supplied Pride Maintenance with sample parts to be reproduced. Carlson and Mendiola spoke only twice and, although Carlson usually went through Pride Maintenance, he once shipped the products directly to JLM.

The district court did not indicate whether it allowed this evidence under FED. R. EVID. 402[7] or 404(b).[8] The

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[7] "All relevant evidence is admissible except as otherwise provided. . . . " FED. R. EVID. 402.

[8] "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show

government contends that the evidence was admissible under either rule. The government argues that the evidence was relevant under Rule 402 because Mendiola's transactions with Pride Maintenance were "inextricably intertwined" with the conduct of which he is accused in this case. Furthermore, the government argues that the evidence shows Mendiola's *modus operandi*, which was to send samples of Boeing parts, have copies made, and distribute them as genuine.

The government argues that the evidence was admissible under Rule 404(b) because it tends to prove notice, intent, plan, and knowledge. While evidence of prior bad acts may not be used to show that a defendant had a propensity to act in a particular way, it is admissible to show that the defendant knew what he was doing because he has done it before. The government argues that the probative value of this evidence is not outweighed by its prejudicial effect. Alternatively, the government argues that any error would be harmless.

JLM and Mendiola disagree and argue that the evidence is not admissible because the government failed to show that Mendiola knew that Carlson was making illegal parts. Mendiola also argues that the evidence was improperly used to show propensity. JLM and Mendiola argue that the probative value of this evidence is outweighed by its prejudicial effect.

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action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake. . . . " FED. R. EVID. 404(b).

"We apply a two-pronged test to determine the admissibility of evidence under Fed. R. Evid. 404(b). First, the evidence must be relevant to an issue other than the defendant's character. Second, the evidence must have probative value that is not substantially outweighed by undue prejudice." ***United States v. Misher,*** 99 F.3d 664, 670 (5th Cir. 1996).

> Step two of the test requires that the testimony not be unduly prejudicial. We have held that under the Rules of Evidence, there is a strong presumption that probative evidence should be admitted. ***United States v. Leahy,*** 82 F.3d 624, 637 (5th Cir. 1996) (noting that "while some danger of prejudice is always present, exclusion of extrinsic evidence based on its prejudicial effect 'should occur only sparingly.' ") (quoting ***United States v. Pace,*** 10 F.3d 1106, 1115 (5th Cir. 1993), *cert. denied,* 511 U.S. 1149, 114 S. Ct. 2180, 128 L.Ed.2d 899 (1994)).

***Misher,*** 99 F.3d at 670. "We review a district court's decision to admit extrinsic evidence for abuse of discretion." ***Leahy,*** 82 F.3d at 636. After reviewing the record, we find that the district court did not abuse its discretion by allowing the introduction of the Carlson evidence.[9]

Second, JLM and Mendiola argue that the district court abused its discretion by admitting evidence of a profit sharing payment made to former employee and

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[9] It is unclear whether the district court instructed the jury that this evidence also applies to Stewart. The question of admissibility against Stewart is moot, however, because we have already determined that Stewart's conviction must be reversed on other grounds.

witness Janice Todd. At trial, the government introduced evidence that former JLM employee Janice Todd received a payment of $2,025 from JLM shortly after the trial date was set. This money was characterized as a "profit-sharing payment," and was sent through the investment firm of Dean Witter Reynolds, which administers JLM's profit-sharing plan. Sigrid Jones, a sales assistant at Dean Witter Reynolds, testified that only three employees had ever been enrolled in JLM's profit-sharing plan: Jose Mendiola, his wife, Marie Mendiola, and Janice Todd. Todd was employed by JLM for over two years, from January 1992 to May 1994. Her responsibilities included taking requests for quotes and researching prices. Approximately one year after Todd had left JLM, and after a trial date had been set, Marie Mendiola instructed Dean Witter Reynolds to establish a profit-sharing account for Todd. The account was paid-out and terminated several weeks later.

The government argues that evidence of the payment was admissible because it tends to show that Mendiola and JLM were attempting to influence Todd's testimony at trial, thereby evincing a consciousness of guilt. *See United States v. Gordon*, 987 F.2d 902, 907 (2d Cir. 1993) (attempts to influence witness testimony are admissible to prove consciousness of guilt). Mendiola and JLM argue that the payment was for a legitimate purpose and, therefore, evidence concerning it should have been excluded because its probative value was outweighed by the danger of unfair prejudice. After reviewing the record, we hold that the district court did not abuse its discretion by allowing the admission of this evidence.

Third, JLM and Mendiola argue that the district court erred by considering the Carlson transactions as relevant conduct for sentencing purposes.[10] JLM and Mendiola argue that the Carlson transactions could not be considered relevant conduct because the government failed to show by a preponderance of the evidence that JLM or Mendiola knew that Carlson was engaging in illegal conduct.

"We review the district court's application and legal interpretation of the sentencing guidelines de novo . . . and its findings of fact for clear error." ***United States v. Ismoila,*** 100 F.3d 380, 394 (5th Cir. 1996).

Under U.S.S.G. § 1B1.3, a sentencing court must consider "relevant conduct" in determining a defendant's guideline range. Relevant conduct includes all acts and omissions, committed by the defendant or by others, if reasonably foreseeable, "that were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. § 1B1.3(a)(1) & (a)(2): "For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to

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[10] At sentencing, the district court determined that the loss caused to Mexicana Airlines by Appellants' conduct was approximately $97,000. This loss amount would have required a 6-level increase in Appellants' offense levels. See U.S.S.G. § 2F1.1. The district court found, however, that the involvement of JLM and Mendiola in the Carlson transactions constituted relevant conduct under U.S.S.G. § 1B1.3, and added approximately $500,000 to the loss calculations. The resulting total loss figure, of between $500,000 and $800,000 required a 10-level increase in Appellants' offense levels.

each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar *modus operandi*." U.S.S.G. § 1B1.3 n.9 (emphasis in original). "Factors that are appropriate to the determination of whether offenses are sufficiently connected or related to each other to be considered as part of the same course of conduct include the degree of similarity of the offenses, the regularity (repetitions) of the offenses, and the time interval between the offenses." ***Id.*** "Under the sentencing guidelines, a defendant is accountable for all relevant conduct, ***United States v. Sotelo***, 97 F.3d 782, 799 (5th Cir. 1996), a concept that includes his own conduct and the foreseeable acts of co-conspirators." ***United States v. Gray***, 105 F.3d 956, 970 (5th Cir.), *cert. denied*, 117 S. Ct. 1326 (1997); U.S.S.G. § 1B1.3(a)(1)(B). After reviewing the record, we hold that the district court did not commit clear error by determining that the Carlson transactions were relevant conduct for sentencing purposes.

Next, JLM and Mendiola argue the district court abused its discretion by instructing the jury on deliberate indifference,[11] and by failing to give an instruction on

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[11] The district court instructed the jury as follows:

> The word "knowingly," that is a term that has been used from time to time in these instructions, means that the act was done voluntarily and intentionally and not because of mistake or an accident. You may find that the defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him.
>
> While knowledge on the part of the defendant cannot be established merely by demonstrating that

subjective knowledge.[12] "We review challenges to jury instructions to determine whether the court's charge, as a whole, is a correct statement of the law and whether it clearly instructs jurors as to the principles of law applicable to the factual issues confronting them." *Gray*, 105 F.3d at 967 (internal citations omitted). "The district court's charge must be legally accurate and factually supported by the evidence." *Id.* In evaluating whether the evidence is sufficient to support the jury charge, we view the evidence, and all reasonable inferences that may be drawn therefrom, in the light most favorable to the government. *Id.* A district court's refusal to give a requested

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> the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

[12] Appellants requested that the following language be included in the charge:

> The Defendant's ignorance must be solely and entirely the result of his having made a conscious purpose to disregard. In that regard, the defendant must be all but certain of the particular crime and of particular matter, and its existence, and that there is a higher probability that the fact exists. In that regard you must judge defendant's actions subjectively from his perspective at the time of the transactions and not what may have been reasonable only after a review of all the evidence and documents. In other words, you are not to judge the defendant from what appears an average person would have done at the time. You must judge the defendant's action based upon what he alone subjectively knew at the time. Furthermore, neither reckless disregard nor suspicion is sufficient. Also remember that an act is not done knowingly if it is done by mistake or accident or other innocent purpose.

jury instruction is reviewed for abuse of discretion. ***United States v. Clements,*** 73 F.3d 1330, 1338 (5th Cir. 1996).

"The purpose of the deliberate ignorance instruction is to inform the jury that it may consider evidence of the defendant's charade of ignorance as circumstantial proof of guilty knowledge." ***United States v. McKinney,*** 53 F.3d 664, 676 (5th Cir.), *cert. denied,* 116 S. Ct. 261 (1995). "It should only be given when a defendant claims a lack of guilty knowledge and the proof at trial supports an inference of deliberate indifference." ***Id.***

JLM and Mendiola based their defense upon, *inter alia,* lack of guilty knowledge or intent to deceive. Furthermore, we have approved this instruction as being a correct statement of law. ***See United States v. Investment Enterprises,*** 10 F.3d 263 (5th Cir. 1993). After reviewing the record, we hold that there is enough evidence to support the deliberate indifference instruction, and the instruction, as given, was a correct statement of the law. The district court did not commit clear error.

To the extent that JLM and Mendiola raise issues pertaining to the sufficiency of the evidence, we have reviewed the record and find no error.

## CONCLUSION

For the foregoing reasons, the convictions and sentence of Arthur Stewart are **VACATED.** The case against Arthur Stewart is **REMANDED** to the district court for entry of dismissal. The convictions and sentence against

JLM Aviation International, Inc. and Jose Mendiola is **AFFIRMED.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50356

UNITED STATES OF AMERICA

Plaintiff – Appellee

v.

JLM AVIATION INTERNATIONAL, INCORPORATED; JOSE L. MENDIOLA; ARTHUR STEWART

Defendants – Appellants

Appeal from the United States District Court
for the Western District of Texas, San Antonio

**ON PETITIONS FOR REHEARING**

(Filed Aug. 29, 1997)

Before POLITZ, Chief Judge, DeMOSS, Circuit Judge and DOHERTY*, District Judge.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above case are DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

* District Judge of the Western District of Louisiana, sitting by designation.

*United States Court of Appeals*

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

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September 8, 1997

Mr William Putnicki, Clerk
Western District of Texas, San Antonio
United States District Court
655 East Durango Boulevard
US Courthouse
San Antonio, TX 78206

No. 96-50356 USA v. JLM Aviation, Et Al., Mendiola & Stewart USDC No. SA-95-CR-78

Enclosed, for the district court only, is a certified copy of the judgments issued as the mandate.

Enclosed, for the district court only, is a copy of the court's opinion.

Record/original papers/exhibits are returned:

( 23 ) Volumes ( 1 ) Envelope ( 2 ) Sealed Envelopes

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Amanda Maria Sutton
Amanda Maria Sutton,
Deputy Clerk

/1mm

cc: (letter only)
Honorable Edward C Prado
Mr Michael Debs Bernard
Ms Florence Y Pan
Mr Philip J Lynch

MDT-1

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

| | |
|---|---|
| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>ARTHUR STEWART, JOSE L. MENDIOLA, GARY AEROSPACE CORPORATION, and JLM AVIATION INTERNATIONAL, INC.,<br><br>Defendants. | CRIMINAL NO. SA95CR078<br><br>**INDICTMENT**<br>Violations:<br><br>18 U.S.C. § 371 (Conspiracy)<br>18 U.S.C. § 1341 (Mail Fraud)<br>18 U.S.C. § 1343 (Wire Fraud)<br>18 U.S.C. § 1001 (False Statements)<br>18 U.S.C. § 2 (Aiding and Abetting, Causing an Act) |

THE GRAND JURY CHARGES:

## COUNT 1

[Conspiracy, 18 U.S.C. § 371]

At times material to this Indictment:

### A. INTRODUCTION

1. As set forth herein, during 1992, Defendants conspired to, and thereafter did, manufacture counterfeit, defective and fraudulently documented aircraft parts for resale and installation on civil aircraft. Defendants

ARTHUR STEWART and GARY AEROSPACE CORPORATION manufactured parts for Defendants JOSE L. MENDIOLA and JLM AVIATION INTERNATIONAL, INC., who falsely represented to customers that the parts were genuine and airworthy Boeing Company parts.

## B. DEFENDANTS

2. Defendant ARTHUR STEWART was a resident of the Hondo, Texas, area and was Vice President and General Manager of Defendant GARY AEROSPACE CORPORATION.

3. Defendant JOSE L. MENDIOLA was a resident of Naperville, Illinois, and was President of Defendant JLM AVIATION INTERNATIONAL, INC.

4. Defendant GARY AEROSPACE CORPORATION [GARY AEROSPACE] was a Texas corporation located at the Hondo Municipal Airport, Hondo, Texas, and was in the business of repairing and maintaining aircraft. GARY AEROSPACE held a United States Department of Transportation, Federal Aviation Administration [FAA] repair station certificate which authorized it to repair certain aircraft, including the Boeing Company Model 727-100 and 727-200 series aircraft. GARY AEROSPACE was not an Original Equipment Manufacturer or a holder of a FAA Parts Manufacturing Approval and was thus not authorized to manufacture any civil aircraft parts.

5. Defendant JIM AVIATION INTERNATIONAL, INC. [JLM AVIATION] was located in Naperville, Illinois, was an Illinois corporation, and operated as an aircraft

parts broker. Defendant JLM AVIATION located and purchased aircraft parts from vendors, including parts manufacturers, and resold the parts to Defendant JLM AVIATION's customers, which included various commercial airlines around the world. Defendant JLM AVIATION was not authorized by the FAA to manufacture, or approve the manufacture, of any civil aircraft parts.

## C. BACKGROUND

### Federal Regulation of Civil Aviation

6. The United States Congress enacted laws to promote the safety of flight of civil aircraft in air commerce and to create rules, regulations, and minimum standards in the interest of safety. Congress empowered and directed the Secretary of Transportation to carry out those duties.

7. The United States Department of Transportation was a department of the United States.

8. The FAA, an agency of the United States Department of Transportation, was established by Congress to, among other things, establish and enforce safety standards for civil aviation, including standards for the manufacture and repair of parts used in commercial airliners.

9. Pursuant to law, the FAA regulated the design, manufacture, repair and use of civil aircraft. Under federal aviation regulations, the FAA issued Aircraft Type Certificates, Production Certificates, Repair Station Certificates, and Airworthiness Certificates, and regulated the quality of materials and parts used in aircraft production and maintenance, through, among other things, the

issuance of Parts Manufacturing Approvals as discussed below.

10. Replacement parts installed on aircraft with Type Certificates were required to comply with provisions of federal aviation regulations. Replacement parts had to be certified as having been manufactured and tested in accordance with FAA-approved assurance standards. Use of a non-approved replacement part on an aircraft rendered its Type Certificate and Airworthiness Certificate invalid.

11. Foreign air carriers, such as foreign commercial airlines, operating civil aircraft within the United States were subject to federal aviation regulations and oversight by the FAA.

**Authorized Replacement Parts Producers**

12. Federal aviation regulations recognized, as relevant herein, two primary authorized classes of aircraft parts producers: an Original Equipment Manufacturer or its licensee [hereinafter, collectively, OEM]; and a company which obtained Parts Manufacturer Approval [PMA] from the FAA.

13. Replacement parts made directly by OEMs and PMA holders were subjected to FAA-approved quality assurance procedures, including detailed inspections, testing and material analysis throughout the design and manufacturing process. PMA holders were required to manufacture parts based on approved design data, including drawings and specifications for a particular

part. There were significant costs to a manufacturer necessarily associated with obtaining a PMA from the FAA.

14. For the purpose of selling their products, aircraft parts manufacturers certified to customers that the replacement parts had been produced in accordance with federal aviation regulations as a means of assuring the customer that the part conformed to approved standards in accordance with federal regulations and could be traced to an OEM or PMA holder, and that it was an FAA-approved part which could be installed on an aircraft possessing a Type Certificate.

**The Boeing Slat Track Roller Bolt for the 727 Aircraft**

15. The Boeing Company [Boeing] of Seattle, Washington, was an OEM and manufactured the Model 727-100 and 727-200 series aircraft, and some of their replacement parts, for use in civil aviation. Boeing ended production of the 727 in 1984, after delivering approximately 1,831 of the aircraft to customers. As of 1992, approximately 1,500 were still in service, carrying approximately 10 million passengers each months.

16. The leading edge of the wings of 727 aircraft had "slats," or airfoil control surfaces, which were deployed during take-offs and landings to provide the aircraft with additional lift or drag as required for flight. The slats were deployed by slat tracks which were held in place by slat track roller bolt assemblies. The bolt assemblies were comprised of a bolt into which a grease fitting was placed.

17. The slat track roller bolt assemblies for the 727 aircraft were designated by Boeing as having the part number 69-13995-4.

## D. THE CONSPIRACY AND ITS OBJECTS

18. From a date unknown to the Grand Jury, but from approximately May 1992, and continuing thereafter until approximately December 1992, in the Western District of Texas and elsewhere, Defendants

**ARTHUR STEWART,**

**JOSE L. MENDIOLA,**

**GARY AEROSPACE CORPORATION, and**

**JLM AVIATION INTERNATIONAL, INC.**

knowingly and willfully conspired and agreed together and with each other to:

a. defraud the United States and its agency the United States Department of Transportation, and the FAA, by impeding, impairing, obstructing and defeating the lawful government functions of the Department of Transportation and the FAA by depriving the United States of its governmental functions and rights to have its business and affairs – namely, administration and regulation of civil aviation in the United States – conducted free from trickery, dishonesty, deceit, unlawful impairment, obstruction and fraud;

b. devise a scheme and artifice to defraud and obtain money by means of false and fraudulent

representations, and, for the purpose of executing such scheme and artifice, cause matters and things to be delivered by mail according to the direction thereon, in violation of Title 18, United States Code, Sections 1341 and 2; and

c. devise a scheme and artifice to defraud and obtain money by means of false and fraudulent representations, and, for the purpose of executing such scheme and artifice, cause to be transmitted by means of wire in interstate and foreign commerce writings, signs, signals and sounds, in violation of Title 18, United States Code, Sections 1343 and 2.

## E. MANNER AND MEANS OF THE CONSPIRACY

The conspiracy was accomplished by the following means, among others, and in the following manner:

19. It was part of the conspiracy that Defendants ARTHUR STEWART, JOSE L. MENDIOLA, GARY AEROSPACE and JLM AVIATION devised a plan whereby Defendants ARTHUR STEWART and GARY AEROSPACE would and did produce bolt assemblies, through a process referred to as "reverse engineering" based on a sample provided by Defendants JOSE L. MENDIOLA and JLM AVIATION, through an intermediary, for sale to Defendants JOSE L. MENDIOLA and JLM AVIATION, who would and did sell the bolt assemblies to customers in the civil aviation industry falsely representing that the bolt assembles were genuine and FAA-approved airworthy Boeing products.

20. It was a further part of the conspiracy that Defendants ARTHUR STEWART and GARY AEROSPACE

would and did produce approximately 1,350 counterfeit, defective and fraudulently documented slat track roller bolt assemblies.

21. It was a further part of the conspiracy that Defendant GARY AEROSPACE would and did sell to Defendant JLM AVIATION the approximately 1,350 counterfeit, defective and fraudulently documented slat track roller bolt assemblies while representing that the parts were in fact genuine Boeing parts in an airworthy condition.

22. It was a further part of the conspiracy that Defendants JOSE L. MENDIOLA and JLM AVIATION would and did purchase the approximately 1,350 counterfeit, defective and fraudulently documented bolt assemblies for resale to commercial airlines and others, while representing to customers that the parts were in fact genuine Boeing parts in an airworthy condition.

23. It was a further part of the conspiracy that Defendants ARTHUR STEWART, JOSE L. MENDIOLA, GARY AEROSPACE and JLM AVIATION concealed the production, sale, and distribution of the counterfeit, defective and fraudulently documented slat track roller bolt assembles from the FAA.

## F. OVERT ACTS

24. In order to further the objects and purposes of this conspiracy, the following and other overt acts were committed within the Western District of Texas and elsewhere:

(1) On or about May 14, 1992, Defendants JOSE L. MENDIOLA and JLM AVIATION sent a request for quotation from Naperville, Illinois, to an intermediary in Hondo, Texas, stating that they were sending a sample of the "BOEING BOLT WE NEED TO HAVE MANUFACTURED" and specifying that the part number of the bolt was 69-13995-4; that they were then paying $23.00 for each bolt assembly for a quantity of 500 or more; that they were interested in purchasing a quantity of 500 to 1,000 bolt assemblies; and asking for the return of the sample bolt assembly if the bolt assemblies could not be provided,

(2) On or about May 14, 1992, Defendants JOSE L. MENDIOLA and JLM AVIATION sent a sample bolt assembly to an intermediary in Hondo, Texas.

(3) On or about May 29, 1992, Ameritech Fastener MFG, Inc. sent a facsimile quotation for standard bolts with the part number NAS6708-52 at a price of $7.80 each from Fort worth, Texas, to Defendant GARY AEROSPACE in Hondo, Texas.

(4) On or about June 2, 1992, Defendant GARY AEROSPACE sent Purchase Order No. H-15085 to Ameritech Fastener MFG, Inc. for 500 standard bolts with the part number NAS6708-52 at a price of $7.80 each for a total of $3,900.00 via facsimile from Hondo, Texas, to Fort Worth, Texas.

(5) On or about June 2, 1992, Defendant GARY AEROSPACE sent a quotation for various quantities of bolt assemblies with the Boeing part number 69-13995-4 via facsimile from Hondo, Texas, to Defendants JOSE L. MENDIOLA and JLM AVIATION in Naperville, Illinois.

(6) On or about June 3, 1992, Defendant JLM AVIATION sent Purchase Order No. 12063 for 500 bolt assemblies with the Boeing part number 69-13995-4 at a price of $21.00 per bolt for a total of $10,500.00 via facsimile from Naperville, Illinois, to Defendant GARY AEROSPACE in Hondo, Texas.

(7) On or about July 13, 1992, Defendant JLM AVIATION sent Purchase Order No. 12354 for 850 bolt assemblies with the Boeing part number 69-13995-4 at a price of $21.00 per bolt for a total of $17,850.00 from Naperville, Illinois, to Defendant GARY AEROSPACE in Hondo, Texas.

(8) On or about July 16, 1992, Defendant GARY AEROSPACE sent Purchase Order No. H-15223 for 850 standard bolts with the part number NAS6708-52 at a price of $6.40 each for a total of $5,440.00 from Hondo, Texas, to Ameritech Fastener MFG, Inc. in Fort Worth, Texas.

**Overt Acts 9 through 11**

On or about the dates set forth below, pursuant to Defendant GARY AEROSPACE's purchase orders, Ameritech Fastener MFG, Inc. sent invoices in the approximate amounts indicated for standard bolts with the part number NAS6708-52 and shipped bolts in the quantities indicated from Fort Worth, Texas, to Defendant GARY AEROSAPCE in Hondo, Texas:

| OVERT ACT NO. | INVOICE DATE | INVOICE NO. | NO. OF BOLTS | INVOICE AMOUNT |
|---|---|---|---|---|
| (9) | 8/17/92 | 2118 | 353 | $2,753.40 |
| (10) | 8/28/92 | 2124 | 135 | $1,053.00 |
| (11) | 9/14/92 | 3011 | 884 | $5,630.80 |

(12) On or about August 20, 1992, Ameritech Fastener MFG, Inc. sent a test certification for 353 standard bolts with the part number NAS6708-52 from Fort Worth, Texas, to Defendant GARY AEROSPACE in Hondo, Texas.

(13) On or about August 28, 1992, Ameritech Fastener MFG, Inc. sent a test certification for 135 standard bolts with the part number NAS6708-52 from Fort Worth, Texas, to Defendant GARY AEROSPACE in Hondo, Texas.

(14) On or about September 28, 1992, Defendant GARY AEROSPACE sent check no. 15780 in the amount of $5,630.80 from Hondo, Texas, to Ameritech Fastener MFG, Inc. in Fort Worth, Texas.

(15) On or about October 7, 1992, Ameritech Fastener MFG, Inc. sent two test certifications for an aggregate total of 884 standard bolts with the part number NAS6708-52 via facsimile and mail from Fort Worth, Texas, to Defendant GARY AEROSPACE in Hondo, Texas.

**Overt Acts 16 through 22**

On or about the dates set forth below, Defendant GARY AEROSPACE transmitted invoices in the approximate amounts indicated for slat track roller bolt assemblies at a price of $21.00 each, which were described on the invoices as either "BOLTS," "BOLTS, NAS6708-52 MODIFIED TO 69-13995-4," or "BOLTS, NAS6708-52

MODIFIED TO 69-13995-4 AS PER SAMPLE," from Hondo, Texas, to Defendant JLM AVIATION in Naperville, Illinois, as follows:

| OVERT ACT NO. | INVOICE DATE | INVOICE NO. | NO. OF BOLTS ASSEMBLIES | INVOICE AMOUNT |
|---|---|---|---|---|
| (16) | 9/2/92 | H27826 | 335 | $7,035.00 |
| (17) | 10/6/93 | H27866 | 100 | $2,100.00 |
| (18) | 10/14/92 | H27873 | 254 | $5,437.40 |
| (19) | 10/19/92 | H27877 | 232 | $4,975.40 |
| (20) | 10/26/92 | H27888 | 263 | $5,523.00 |
| (21) | 10/30/92 | H27894 | 151 | $3,224.50 |
| (22) | 11/3/92 | H27907 | 15 | $315.00 |

**Overt Acts 23 through 29**

On or about the dates set forth below, Defendant GARY AEROSPACE shipped bolt assemblies in the quantities referenced, which were described on the shipping orders as "BOLTS, NAS6708-52 MODIFIED TO 69-13995-4 AS PER SAMPLE" – with the exception of the first shipping order which described the items shipped as "BOLTS, P/N 69-13995-4" – from Hondo, Texas, to Defendant JLM AVIATION in Naperville, Illinois, as follows:

| OVERT ACT NO. | DATE SHIPPED | NO. OF BOLT ASSEMBLIES |
|---|---|---|
| (23) | 9/4/92 | 335 |
| (24) | 9/30/92 | 100 |
| (25) | 10/14/92 | 254 |
| (26) | 10/20/92 | 232 |
| (27) | 10/26/92 | 263 |
| (28) | 10/30/92 | 151 |
| (29) | 11/3/92 | 15 |

(30) On or about September 4, 1992, Defendant GARY AEROSPACE sent a purported "TEST CERTIFICATION" for bolt assemblies from Hondo, Texas, to Defendant JLM AVIATION in Naperville, Illinois.

(31) On or about October 26, 1992, Defendant GARY AEROSPACE sent a purported "TEST CERTIFICATION" for bolt assemblies from Hondo, Texas, to Defendant JLM AVIATION in Naperville, Illinois.

**Overt Acts 32 through 36**

On or about the dates set forth below, Defendants JOSE L. MENDIOLA and JLM AVIATION mailed the referenced checks payable to Defendant GARY AEROSPACE in the approximate amounts indicated from Naperville, Illinois, to Defendant GARY AEROSPACE in Hondo, Texas, as follows:

| OVERT ACT NO. | DATE MAILED | JLM CHECK NO. | AMOUNT |
|---|---|---|---|
| (32) | 9/15/92 | 18146 | $7,035.00 |
| (33) | 11/4/92 | 18385 | $2,100.00 |
| (34) | 11/13/92 | 18455 | $5,437.40 |
| (35) | 11/30/92 | 18528 | $10,498.40 |
| (36) | 12/9/92 | 18599 | $3,539.50 |

**Overt Acts 37 through 41**

On or about the dates set forth below, Defendant GARY AEROSPACE deposited the referenced checks received from Defendant JLM AVIATION into Defendant GARY AEROSPACE's account at Broadway National Bank in San Antonio, Texas, as follows:

| OVERT ACT NO. | DEPOSIT DATE | JLM CHECK NO. | AMOUNT |
|---|---|---|---|
| (37) | 9/24/92 | 18146 | $7,035.00 |
| (38) | 11/9/92 | 18385 | $2,100.00 |
| (39) | 11/23/92 | 18455 | $5,437.40 |
| (40) | 12/7/92 | 18528 | $10,498.40 |
| (41) | 12/18/92 | 18599 | $3,539.50 |

All in violation of Title 18, United States Code, Section 371.

## COUNTS 2 through 6

[Mail Fraud, 18 U.S.C. § 1341]

### THE SCHEME AND ARTIFICE TO DEFRAUD

25. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 17 and 19 through 24 of this Indictment as though set forth in full herein.

### ADDITIONAL MANNER AND MEANS

26. From a date unknown to the Grand Jury, but from approximately May 1992 to in or about August 1993, it was part of the scheme and artifice to defraud and to obtain money by means of false and fraudulent pretenses, representations, and promises that Defendants ARTHUR STEWART, JOSE L. MENDIOLA, GARY AEROSPACE, and JLM AVIATION planned to sell the counterfeit, defective and fraudulently documented bolt assemblies – which were manufactured by Defendants ARTHUR STEWART and GARY AEROSPACE and thereafter sold to Defendants JOSE L. MENDIOLA and JLM AVIATION – to

other parties while representing that the parts were in fact genuine Boeing parts in an airworthy condition.

**Mexicana Airlines Purchases**

27. It was a further part of the scheme and artifice that on or about June 3, 1992, Defendant JLM AVIATION prepared internal documentation in Naperville, Illinois, indicating that it would sell a portion of bolt assemblies purchased from Defendant GARY AEROSPACE for a price of $39.00 each to Mexicana de Aviacion, S.A. de C.V. [Mexicana Airlines] – a foreign commercial airline subject to federal aviation regulations and regulated by the FAA – under a purchase order that Defendant JLM AVIATION had previously obtained from Mexicana Airlines and would retain a portion of those bolt assemblies for Defendent JLM AVIATION's own inventory.

28. It was a further part of the scheme and artifice that on or about June 29, 1992, Defendant JLM AVIATION sent a quotation for, among other things, 1,000 new bolt assemblies with the Boeing part number 69-13995-4 at a price of $39.00 each from Naperville, Illinois, to Mexicana Airlines in Mexico City, Mexico, via an electronic communication facility used in the aircraft industry known as "SITA."

29. It was a further part of the scheme and artifice that on or about July 8, 1992, Mexicana Airlines sent Purchase Order No. CMA-6312-M8 for, among other things, 1,000 bolt assemblies with the Boeing part number 69-13995-4 at a price of $39.00 each for a total of $39,000.00 for the bolt assemblies, from Mexico City, Mexico, to Defendant JLM AVIATION in Naperville, Illinois.

30. It was a further part of the scheme and artifice that on or about August 5, 1992, Defendant JOSE L. MENDIOLA sent an acknowledgement of Mexicana Airlines's order for 1,000 bolt assemblies with the Boeing part number 69-13995-4 at a price of $39.00 each via facsimile from Naperville, Illinois, to Mexicana Airlines in Mexico City, Mexico.

31. It was a further part of the scheme and artifice that on or about August 31, 1992, Defendant JOSE L. MENDIOLA and JLM AVIATION sent a message stating that due to a delay by the manufacturer, they were scheduled to receive and ship 301 bolt assemblies to Mexicana Airlines on September 10, 1992, from Naperville, Illinois, via SITA to Mexicana Airlines in Mexico City, Mexico.

32. It was a further part of the scheme and artifice that on or about the dates set forth below, Defendant JLM AVIATION sent invoices for bolt assemblies with the Boeing part number 69-13995-4 in the quantities indicated at a price of $39.00 each in the total amounts indicated, including freight, from Naperville, Illinois, to Mexicana Airlines in Mexico City, Mexico, as follows:

| INVOICE DATE | INVOICE NO. | NO. OF BOLT ASSEMBLIES | INVOICE AMOUNT |
|---|---|---|---|
| 9/9/92 | 013588 | 301 | $11,818.87 |
| 10/1/92 | 013724 | 134 | $5,257.02 |
| 10/19/92 | 013840 | 254 | $9,961.64 |
| 10/21/92 | 013851 | 232 | $9,100.86 |
| 10/27/92 | 013897 | 263 | $10,301.56 |
| 11/2/92 | 013941 | 117 | $4,593.09 |

33. It was a further part of the scheme and artifice that on or about the dates set forth below, Defendant JLM

AVIATION shipped bolt assemblies in the quantities indicated which purported to be bolt assemblies with the Boeing part number 69-13995-4 and a certification which falsely stated that the material shipped was "ORIGINALLY MANUFACTURED BY BOEING OR ONE OF THEIR AUTHORIZED LICENSEES" and that the FAA-authorized source of the bolt assemblies was an OEM, authorized distributor or an FAA/PMA – when in fact the bolt assemblies were manufactured by Defendants ARTHUR STEWART and GARY AEROSPACE in the Western District of Texas – from Naperville, Illinois, to Mexicana Airlines in Des Plaines, Illinois, or Brownsville, Texas, as follows:

| DATE SHIPPED | NO. OF BOLT ASSEMBLIES SHIPPED |
|---|---|
| 9/9/92 | 301 |
| 10/1/92 | 1134 |
| 10/19/92 | 254 |

| DATE SHIPPED | NO. OF BOLT ASSEMBLIES SHIPPED |
|---|---|
| 10/21/92 | 232 |
| 10/27/92 | 263 |
| 11/2/92 | 117 |

34. It was a further part of the scheme and artifice that in or about 1993, Mexicana Airlines paid a total of approximately $50,000 to Defendant JLM AVIATION for invoices that Defendant JLM AVIATION submitted to Mexicana Airlines for shipments of what purported to be genuine and airworthy Boeing-manufactured slat track roller bolt assemblies, Boeing part number 69-13995-4.

**Other Purchases of Bolt Assemblies from JLM Aviation The Dee Howard Company Purchase**

35. It was a further part of the scheme and artifice that on or about February 18, 1993, Defendant JLM AVIATION offered a quantity of bolt assemblies with Boeing part number 69-13995-4 for sale via the Inventory Locator Service [ILS] – a private electronic database located in Memphis, Tennessee, and used throughout the aircraft industry to advertise and locate aircraft replacement parts for sale – from the Western District of Tennessee to the Western District of Texas.

36. It was a further part of the scheme and artifice that on or about February 18, 1993, The Dee Howard Co. [Dee Howard], an FAA-certified aircraft repair company located in San Antonio, Texas, sent Purchase Order No. 4-103788 for four (4) Boeing bolt assemblies with the Boeing part number 69-13995-4 at a price of $39.00 each, with the notation "Require Certificate of Compliance for above Boeing Item," via facsimile from San Antonio, Texas, to Defendant JLM AVIATION in Naperville, Illinois.

37. It was a further part of the scheme and artifice that on or about February 18, 1993, Defendant JLM AVIATION sent a "Sales & Use Tax Certificate of Exemption" form seeking additional information from Dee Howard necessary for Defendant JLM AVIATION to process Dee Howard's purchase order for 4 Boeing bolt assemblies via facsimile from Naperville, Illinois, to Dee Howard in San Antonio, Texas.

38. It was a further part of the scheme and artifice that on or about February 18, 1993, Defendant JLM AVIATION sent Invoice No. 014663 for four (4) bolt assemblies with the Boeing part number 69-13995-4 at a price of $39.00 each for a total, including freight, of $178.05 to Dee Howard in San Antonio, Texas.

39. It was a further part of the scheme and artifice that on or about February 18, 1993, Defendant JLM AVIATION shipped four (4) bolt assemblies from Naperville, Illinois, to Dee Howard in San Antonio, Texas, which purported to be bolt assemblies with the Boeing part number 69-13995-4 and a certification which falsely stated that the material shipped was "ORIGINALLY MANUFACTURED BY BOEING OR ONE OF THEIR AUTHORIZED LICENSEES" and that the FAA-authorized source of the bolt assemblies was on OEM, authorized distributor or an FAA/PMA – when in fact the bolt assemblies were manufactured by Defendants ARTHUR STEWART and GARY AEROSPACE in the Western District of Texas.

40. It was a further part of the scheme and artifice that on or about February 19, 1993, Dee Howard sent check no. 22815 in the amount of $178.05 from San Antonio, Texas to Defendant JLM AVIATION in Naperville, Illinois.

**JIMCO & Associates, Inc. Purchase**

41. It was a further part of the scheme and artifice that on or about August 19, 1993, Defendants JOSE L. MENDIOLA and JLM AVIATION in Naperville, Illinois, gave a price quotation via telephone for eight (8) slat

track roller bolt assemblies with Boeing part number 69-13995-4 at a price of $39.00 each to JIMCO & Associates, Inc. [JIMCO] in Grand Prairie, Texas.

42. It was a further part of the scheme and artifice that on or about August 19, 1993, JIMCO sent Purchase Order No. 819-1 for eight (8) slat track roller bolt assemblies with Boeing part number 69-13995-4 at a price of $39.00 each via facsimile from Grand Prairie, Texas, to Defendants JOSE L. MENDIOLA and JLM AVIATION in Naperville, Illinois.

43. It was a further part of the scheme and artifice that on or about August 19, 1993, Defendant JLM AVIATION mailed Invoice No. 016017 for eight (8) bolt assemblies with the Boeing part number 69-13995-4 at a price of $39.00 each for a total, including freight, of $336.65 from Naperville, Illinois, to JIMCO in Grand Prairie, Texas.

44. It was a further part of the scheme and artifice that on or about August 19, 1993, Defendant JLM AVIATION shipped eight (8) bolt assemblies from Naperville, Illinois, to JIMCO in Grand Prairie, Texas, which purported to be bolt assemblies with the Boeing part number 69-13995-4 and a certification which falsely stated that the material shipped was "ORIGINALLY MANUFACTURED BY BOEING OR ONE OF THEIR AUTHORIZED LICENSEES" and that the FAA-authorized source of the bolt assemblies was Eastern Airlines, a U.S. carrier – when in fact the bolt assemblies were manufactured by Defendants ARTHUR STEWART and GARY AEROSPACE in the Western District of Texas.

45. It was a further part of the scheme and artifice that on or about August 20, 1993, JIMCO sent check no.

5044 in the amount of $336.65 from Grand Prairie, Texas to Defendant JLM AVIATION in Naperville, Illinois.

## USE OF THE MAILS

46. As more fully set forth below, and on or about the dates listed below in the Western District of Texas and elsewhere, Defendants

**ARTHUR STEWART,**

**JOSE L. MENDIOLA,**

**GARY AEROSPACE CORPORATION, and**

**JLM AVIATION INTERNATIONAL, INC.**

having knowingly devised and intending to devise, and while participating in, a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, for the purposes of executing the scheme and artifice, and attempting to do so, knowingly caused the items described below to be delivered by U.S. mail, to wit: checks were mailed from Defendants JOSE L. MENDIOLA and JLM AVIATION, in the Northern District of Illinois, to Defendants ARTHUR STEWART and GARY AEROSPACE, in the Western District of Texas, such items being delivered according to the directions thereon, each such mailing constituting a separate count of this indictment:

| COUNT | DATE | AMOUNT OF CHECK |
|---|---|---|
| 2 | September 15, 1992 | $7,035.00 |
| 3 | November 4, 1992 | $2,100.00 |
| 4 | November 13, 1992 | $5,437.40 |
| 5 | November 30, 1992 | $10,498.40 |
| 6 | December 9, 1992 | $3,539.50 |

All in violation of Title 18, United States Code, Sections 1341 and 2.

**COUNTS 7 through 11**

[Wire Fraud, 18 U.S.C. § 1343]

47. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 17, 19 through 24, and 26 through 45 of this Indictment as though set forth in full herein.

48. As more fully set forth below, and on or about the dates listed below, in the Western District of Texas and elsewhere, Defendants

**ARTHUR STEWART,**

**JOSE L. MENDIOLA,**

**GARY AEROSPACE CORPORATION, and**

**JLM AVIATION INTERNATIONAL, INC.**

having knowingly devised and intending to devise, and while participating in, a scheme and artifice to defraud and to obtain money and property by means of false and fraudulent pretenses, representations and promises, for the purposes of executing the scheme and artifice, and attempting to do so, knowingly transmitted and caused to be transmitted by means of wire, radio, or television

communications in interstate commerce, certain writings, signs, signals, pictures and sounds, to wit: as described below, (a) facsimile transmissions to and from Defendants ARTHUR STEWART and GARY AEROSPACE, in the Western District of Texas, to and from Defendants JOSE L. MENDIOLA and JLM AVIATION in the Northern District of Illinois, (b) facsimile transmissions to and from Defendant JOSE L. MENDIOLA and JLM AVIATION in the Northern District of Illinois to and from Dee Howard in the Western District of Texas, and (c) wire transmissions via the ILS from the Western District of Tennessee to the Western District of Texas, each such transmission constituting a separate count of this indictment:

| COUNT | DATE | ITEM SENT | WIRE FROM | WIRE TO |
|---|---|---|---|---|
| 7 | 6/2/92 | Quotation | STEWART/ GARY | MENDIOLA/ JLM |
| 8 | 6/3/92 | Purchase Order | MENDIOLA/ JLM | STEWART/ GARY |
| 9 | 2/18/93 | Advertise-ment | MENDIOLA/ JLM via ILS | Dee Howard |
| 10 | 2/18/93 | Purchase Order | Dee Howard | MENDIOLA/ JLM |
| 11 | 2/18/93 | Tax Form | MENDIOLA/ JLM | Dee Howard |

All in violation of Title 18, United States Code, Sections 1343 and 2.

**COUNT 12**

[False and Fictitious Statements, 18 U.S.C. § 1001]

49. The Grand Jury realleges all of the allegations contained in paragraphs 1 through 17, 19 through 24 and 26 through 45 of this Indictment as though set forth in full herein.

50. As more fully set forth below, and on or about the dates listed below, in the Western District of Texas and elsewhere, Defendants

**JOSE L. MENDIOLA, AND**

**JLM AVIATION INTERNATIONAL, INC.**

knowingly and willfully made and caused to be made false and fictitious material statements and representations, in a matter within the jurisdiction of the United States Department of Transportation, and the FAA, agencies of the United States, to wit, Defendants JOSE L. MENDIOLA and JLM AVIATION made and caused to be made a certification which falsely stated that the purported slat track roller bolt assemblies sold to Dee Howard were: (a) bolt assemblies with the Boeing part number 69-13995-4; (b) "ORIGINALLY MANUFACTURED BY BOEING OR ONE OF THEIR AUTHORIZED LICENSEES"; and (c) came from an FAA-authorized source:

| COUNT | DATE | CUSTOMER |
|---|---|---|
| 12 | February 18, 1993 | Dee Howard |

All in violation of Title 18, United States Code, Sections 1001 and 2.

A TRUE BILL:

/s/ illegible
FOREPERSON

JAMES H. DeATLEY
United States Attorney

By: /s/ Christopher L. Varner
CHRISTOPHER L. VARNER
Trial Attorney
Fraud Section, Criminal Division
United States Department of Justice

By: /s/ James A. Baker
JAMES A. BAKER
Trial Attorney
Fraud Section, Criminal Division
United States Department of Justice

DATED: March 8, 1995

**J.L.M. AVIATION INTERNATIONAL, INC.**

MATERIAL CERTIFICATION

CUSTOMER: MEXICANA
PURCHASE ORDER: CMA-1980-M8
DATE: 9/9/92
INVOICE#: 013588

PART NUMBER: 69-13995-4
DESCRIPTION: BOLT
QUANTITY: 30/ea
SERIAL #: N/A

THE UNDERSIGNED HEREBY CERTIFIES THAT THE MATERIAL SHIPPED AGAINST THE ABOVE PURCHASE ORDER IS IN NEW CONDITION AND WAS ORIGINALLY MANUFACTURED BY BOEING OR ONE OF THEIR AUTHORIZED LICENSEES. IT WAS NOT OBTAINED FROM ANY U.S. GOVERNMENT, OR MILITARY SOURCE.

TO THE BEST OF OUR KNOWLEDGE, THIS MATERIAL HAS NOT BEEN SUBJECTED TO SEVERE STRESS OR HEAT, AS IN MAJOR FAILURE, OR ACCIDENT OF FIRE.

THIS CERTIFICATION IS BASED ON DOCUMENTATION SUPPLIED BY OUR VENDOR AND IS ON FILE.

F.A.A. AUTHORIZED SOURCE

( ) 121 OPERATOR – U.S. CARRIER NAME: ____

( ) 129 OPERATOR – FOREIGN CARRIER AUTHORIZED TO OPERATE IN THE U.S.A.: ____

( ) 135 OPERATOR – CARGO OR CHARTER: ____

( ) 145 F.A.A. APPROVED REPAIR STATION: ____

(X) ORIGINAL EQUIPMENT MFG., AUTHORIZED DISTRIBUTOR, (F.A.A./P.M.A.) ____

(_) C.A.A. AUTHORIZED SOURCE: FOREIGN AIRLINE OR INDEPENDENT OVERHAUL FACILITY: _____

AUTHORIZED SIGNATURE: Scott A. Illegible

TITLE: QUALITY CONTROL

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VIOLATION OF RULES/REGULATIONS OF A FEDERAL AGENCY

INSTRUCTION NO. _____

In this case there has been evidence to the effect that the rules or regulations of the Federal Aviation Administration (FAA) may have been violated. Any violation of the rules or regulations of the FAA should not be considered by you as a violation of the criminal law. To violate these rules and regulations is not a crime. Civil liability may attach, but it is not a crime. But you may consider any evidence of violations of such rules and regulations as you would any other evidence in determining whether or not the defendants had the required intent to violate the criminal laws charged in this indictment.

GOOD FAITH DEFENSE

INSTRUCTION NO. _____

The good faith of a defendant is a complete defense to each of the offenses with which that defendant is charged in the indictment. That is because good faith on the part of a defendant is inconsistent with a finding of intent to defraud the government by deceitful or dishonest means, and it is inconsistent with a finding of knowingly making a false statement as alleged in the indictment.

A person who acts on a belief or an opinion honestly held is not punishable under the laws cited in the indictment merely because the belief or opinion turns out to be inaccurate, incorrect, or wrong. An honest mistake in judgment or an error in management does not rise to the level of intent, knowledge, or willfulness that is required under those laws.

The law is intended to subject to criminal punishment only those people who intend to defraud the government, or who knowingly attempt to deceive. That is, the government must prove beyond a reasonable doubt that the individual violated a known legal duty. While the term good faith has no precise definition, it means – among other things – a belief or opinion honestly held, an absence of malice or ill will, and an intention to comply with known legal duties.

The burden of proving good faith does not rest with the defendant you are considering because that defendant does not have an obligation to prove anything in this case. Neither is the government required to prove the absence of good faith. It is the government's burden to

prove to you, beyond a reasonable doubt, each element of the charge as outlined above.

If the evidence in the case leaves the jury with a reasonable doubt as to whether any defendant acted in good faith, the jury must acquit that defendant.

"KNOWINGLY" – TO ACT

INSTRUCTION NO. _____

The word "knowingly," as that term has been used from time to time in these instructions, means that the act was done voluntarily and intentionally, not because of mistake or accident.

You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

SIMILAR ACTS

INSTRUCTION NO. _____

During the course of this trial, you have heard evidence of acts of some of the defendants which may be similar to those charged in the indictment, but which were committed on other occasions. You must not consider any of this evidence in deciding if the defendant committed the acts charged in the indictment. However,

you may consider this evidence for other, very limited purposes.

If you find beyond a reasonable doubt from other evidence in this case that the defendant did commit the acts charged in the indictment, then you may consider evidence of the similar acts allegedly committed on other occasions to determine:

Whether the defendant had the state of mind or intent necessary to commit the crime charged in the indictment;

or

whether the defendant had motive or the opportunity to commit the acts charged in the indictment;

or

whether the defendant acted according to a plan or in preparation for commission of a crime;

or

whether the defendant committed the acts for which he is on trial by accident or mistake.

These are the limited purposes for which any evidence of other similar acts may be considered.